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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BUTTE DIVISION

MAGTENASSET MANAGEMENT
CORPORATION,

Plaintiff,

v.

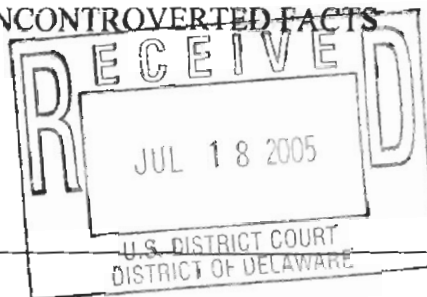
MIKE J. HANSON and ERNIE J. KINDT

Defendants.

Case No. CV-04-26-BU-RFC

05 - 499

STATEMENT OF
UNCONTROVERTED FACTS



Defendants, Mike J. Hanson and Ernie J. Kindt, through their attorneys, Browning, Kaleczyc, Berry & Hoven, P.C., hereby submit their Statement of Uncontroverted Facts in support of Defendant's Motion for Summary Judgment and pursuant to Rule 56.1(a) of the Rules of Procedure of the United States District Court for the District of Montana:

1. On February 15, 2002, pursuant to the terms of a Unit Purchase Agreement ("UPA") entered into between NorthWestern, as purchaser, and The Montana Power Company ("MPC") and Touch America Holdings, Inc. ("TAH") as sellers, NorthWestern acquired the sole unit interest in Montana Power, LLC, a Montana limited liability

1 company. Complaint ¶¶ 22, 26. A true and complete copy of the Complaint is attached
2 hereto as **Exhibit A**.

3 2. Two days previously, as part of a corporate reorganization of MPC into TAH, the
4 electric and natural gas transmission and distribution assets of MPC, as well as MPC's
5 interest in the Milltown Dam, were transferred from MPC to M PLLC. Complaint ¶ 23.

6 3. Among the assets and liabilities transferred to M PLLC were certain 8.45% Junior
7 Subordinated Debentures due in 2036 (the "Junior Debentures") which had been issued
8 by MPC in or about 1996. Complaint ¶ 23.

9 4. The Trust is a business trust established pursuant to the Delaware Business Trust
10 Act. The Trust holds 100% of the Junior Debentures. Complaint ¶ 13; 16.

11 5. The interest paid on these Junior Debentures created the cash flow to make
12 dividend payments on certain Series A 8.45% Quarterly Income Preferred Securities
13 ("QUIPS") which had previously been issued by Montana Power Capital I (The "Trust").
14 Complaint ¶ 15; 16.

15 6. Plaintiff Magten is currently a holder of some but not all the QUIPS. Complaint ¶
16 19; Dep. Tr. p. 55. A true and complete copy of the Deposition of Magten Asset
17 Management Group by Talton Embry, dated July 27, 2004, is attached hereto as **Exhibit**
18 **B**.

19 7. When NorthWestern acquired the unit interest in M PLLC, NorthWestern became
20 the sole Member of M PLLC and named itself as the Manager of M PLLC pursuant to
21 applicable provisions of Montana Limited Liability Company Act. Articles of
22 Organization ¶ X; Written Consent of Sole Member and Manager to Action in Lieu of
23 Meeting, effective as of February 15, 2002, Introduction Paragraph. A true and complete
24
25
26
27

1 copy of the Articles of Organization is attached hereto as **Exhibit C** and a true and
2 complete copy of the February 15, 2002 Written Consent is attached hereto as **Exhibit D**.

3 8. NorthWestern, as sole Member and Manager, appointed certain individuals,
4 including the Defendants, as "officers" of its wholly owned subsidiary, MPLLC, although
5 Montana statutes do not specifically provide that a limited liability company have
6 officers. **Exh. D**, Written Consent of Sole Member and Manager to action in Lieu of
7 Meeting, Effective as of February 15, 2002.

8 9. In August 2002, almost six months after NorthWestern acquired MPLLC (whose
9 name by that time had been changed to NorthWestern Energy, LLC), NorthWestern
10 authorized and directed the transfer of the electric and natural gas transmission and
11 distribution assets and liabilities ("the Montana Utility Assets and Liabilities") held by its
12 subsidiary, NorthWestern Energy, LLC, to it, the parent corporation. Written consent of
13 Sole Member and Manager to Action in Lieu of Meeting dated August 7, 2002. A true
14 and complete copy of the August 7, 2002 Written Consent is attached hereto as **Exhibit**
15 **E**.

16 10. The transfer was effected on November 15, 2002. Asset and Stock Transfer
17 Agreement, dated November 15, 2002. Selected pages of the Asset and Stock Transfer
18 Agreement are attached hereto as **Exhibit F**.

19 11. The Montana Utility Assets and Liabilities transferred included the obligations
20 associated with the Junior Debentures and QUIPS. Other assets and liabilities remained
21 with the limited liability company, whose name was subsequently changed to Clark Fork
22 and Blackfoot, LLC. **Exh. F**, Asset and Stock Transfer Agreement, ¶ 2.

1 12. At the end of April 2003, some six months after NorthWestern had completed the
2 transfer of the Montana Utility Assets and Liabilities to itself, Magten first acquired an
3 interest in some of the QUIPS. Dep. Tr. p. 20.

4 13. Mr. Talton Embry, the sole owner of Magten, has admitted under oath that at the
5 time of the transfer of the Montana Utility Assets and Liabilities in November 2002
6 Magten was not a creditor of Clark Fork and Blackfoot LLC (fka NorthWestern Energy,
7 fka MPLLC). Dep. Tr. p. 27.

9 14. Mr. Embry further admitted under oath that at the time Magten first acquired its
10 interest in the QUIPS, he on behalf of Magten was aware of the prior transfer of the
11 Montana Utility Assets and Liabilities to NorthWestern. Dep. Tr. p. 33, l. 16-p. 34, l. 2.

12 15. Mr. Embry further admitted that he is a "veteran" investor who has been investing
13 in distressed debt since 1978 and that he routinely performs due diligence before making
14 investments. Dep. Tr. p. 14; 78; 17-20.

16 16. Mr. Embry also admitted that he performed due diligence prior to his acquisition
17 of the QUIPS and then personally made the decision to acquire the QUIPS for Magten.
18 Dep. Tr. p. 35-37; 16.

19 17. Magten then continued to acquire additional QUIPS between late April 2003 and
20 June 2004. Dep. Tr. p. 20-23; 55.

22 18. On September 14, 2003, ten (10) months after the transfer of the Montana Utility
23 Assets and Liabilities, and six (6) months after Magten first acquired QUIPS,
24 NorthWestern filed a voluntary petition for reorganization in bankruptcy pursuant to
25 Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court in Delaware.
26 Complaint ¶ 42.
27

1 19. Magten has filed an adversary proceeding against NorthWestern in the bankruptcy
2 proceeding in which it alleges, among other things, that the November 15, 2002 transfer
3 of the Montana Utility Assets and Liabilities from its wholly owned subsidiary limited
4 liability company was a fraudulent conveyance. Magten seeks the rescission of the
5 transfer. See generally, Adversary Proceeding Complaint. A true and complete copy of
6 the Adversary Proceeding Complaint is attached hereto as **Exhibit G**.

8 20. On July 23, 2004 the Hon. Charles G. Case II, the presiding Judge in the
9 NorthWestern Bankruptcy, issued a Memorandum Decision in which he held as follows:

10 The Debtor [NorthWestern] has consistently alleged, and Magten has never
11 disputed, that Magten did not own any of the debentures prior to the time the
12 assets were transferred to the Debtor [NorthWestern]. Rather, Magten acquired
13 the debentures after the transaction was complete. Therefore, the Debtor
14 [NorthWestern] asserts and Magten has not disputed, that Magten was never a
creditor of Clark Fork at a time when Clark Fork had the disputed energy assets.
Rather, Magten became a holder of the debentures only after the transaction was
completed and was a matter of public record.

15 * * *

16 As noted above, Magten was not a creditor of Clark Fork at the time the transaction took
17 place. Rather, it only became a creditor of the Debtor [NorthWestern] after the Debtor
18 [NorthWestern] assumed the liability associated with the junior subordinated debenture
19 initially issued by Montana Power Company. Thus, Magten is not only not a party
20 directly affected by the transaction – such as Clark Fort itself – but it was also not an
21 indirect party at the time the transaction took place.

22 Memorandum Decision at p.3; 6-7 (emphasis added). A true and complete copy of the
23 Memorandum Decision is attached hereto as **Exhibit H**.

24 21. On November 1, 1996, the Montana Power Company and the Bank of New York
25 entered into that certain Indenture for Unsecured Subordinated Debt Securities relating to Trust
26 Securities. Article Eleven of the Indenture permits the transfer of the Indenture from The
27 Montana Power Company to successor entities. Selected pages of the Indenture are attached
hereto as **Exhibit I**.

22. On August 13, 2002, NorthWestern Energy, LLC (f/k/a Montana Power LLC),
NorthWestern Corporation, and the Bank of New York executed that certain Second

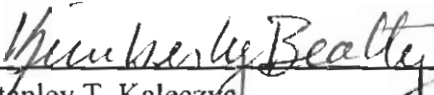
1 Supplemental Indenture, wherein NorthWestern and Clark Fork reserved the right of Clark Fork
2 to transfer substantially all of its assets to NorthWestern and would be relieved of its obligations
3 under the QUIPS Debenture and the Indenture. A complete, true and representative copy of the
4 Second Supplemental Indenture is attached hereto as **Exhibit J**.

5 23. On November 14, 2002, NorthWestern Corporation and the Bank of New York
6 entered into that Third Supplemental Indenture whereby NorthWestern assumed all obligations
7 on the Outstanding Securities under the Indenture and agreed to perform all obligations of
8 NorthWestern Energy, LLC under the Indenture. A true and complete copy of the Third
9 Supplemental Indenture is attached hereto as **Exhibit K**.

10 DATED this 20th day of August, 2004.

11 BROWNING, KALECZYC, BERRY & HOVEN, P.C.

12
13 By

14 
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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of August, 2004, a true copy of the foregoing was mailed by first-class mail, postage prepaid, addressed as follows:

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